

TRADE PRACTICES LAW JOURNAL

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EDITORIAL

Seeing is believing 137

ARTICLES

A bang or a whimper? The impact of ACCC unconscionable conduct enforcement – *Michelle Sharpe and Christine Parker*

This article uses empirical evidence to evaluate the success of the Australian Competition and Consumer Commission (ACCC) in enforcing the unconscionable conduct provisions of the *Trade Practices Act 1974* (Cth) in a number of key cases between 1998 and 2005. The authors find that the ACCC has succeeded in raising awareness of the prohibition against unconscionable conduct. However, it has also faced three major problems: first, its lack of success on the merits in unconscionable conduct cases means that it has made a limited contribution to developing the law in this area and sending out a clear message about what amounts to acceptable or unacceptable business conduct. Second, the ACCC has been criticised for commencing cases too quickly, and for refusing to negotiate settlements or mediate cases in certain circumstances. Finally, the ACCC has been criticised for failing to produce publications that provide a clear guide as to what types of conduct are likely to be regarded by it to be unconscionable and deserving of enforcement action. The authors analyse the validity of these criticisms and what the ACCC might do to address them. 139

The baffling intruder: Section 82(1B) of the Trade Practices Act – Part II – *Danielle Gatehouse*

In July 2004, s 82(1B) of the *Trade Practices Act 1974* (Cth) introduced the concepts of “reasonable care”, “intention” and “fraud” into the consideration of damages for breaches of s 52. Part I of this article ((2007) 15 TPLJ 74) outlined the historical development of the law of transactions as it evolved in s 52 and considered what is meant by “reasonable care” in s 82(1B)(b)(i). Part 2 continues with a consideration of what the terms “intent” and “fraud” in s 82(1B)(c)(i) and (c)(ii) respectively mean in this statutory context. The article concludes by suggesting that the impact of this section could be minimal but that such a view is consistent with the wording of the section, with the consumer protectionist concerns of s 52 and with the damages-limiting approach of s 82(1B). 163

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